IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-194

REVEREND LOUIS R. GIGANTE,

Petitioner,

v.

RODERICK C. LANKLER, DEPUTY ATTORNEY GENERAL OF THE STATE OF NEW YORK, SPECIAL STATE PROSECUTOR,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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The Roman Catholic Archdiocese of New York (hereinafter referred to as the "Archdiocese") hereby respectfully moves for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari to the New York Court of Appeals.

The consent of the Petitioner has been obtained. In response to a request for his consent, the Respondent has advised that he will take no position on that question. The letters from the attorneys for the parties have been filed with the Clerk of this Court.

The interest of the Archdiocese in this case arises immediately from the fact that the Petitioner is an ordained priest of the Archdiocese. He has been adjudged guilty of

criminal contempt and sentenced to jail for ten days for his refusal to answer certain questions put to him when he appeared as a witness before a New York grand jury investigating certain alleged crimes.

Less immediate, but nevertheless of paramount interest to the priests, religious and laity of the Archdiocese, is the important issue of religious freedom raised by the action of the New York courts in rejecting the Petitioner's invocation of the religion clause of the First Amendment. He had declined to answer on the ground that the questions propounded to him concerned acts performed by him in the exercise of his religious ministry and were, on the facts of this case, an unnecessary interference with the free exercise of his religion, since his answers were not needed to advance the grand jury's investigation.

The limitations, if any, on a grand jury's right to elicit the testimony of a clergyman as to actions taken in the practice of his ministry is a subject of deep concern to men and women of all faiths engaged in the performance of religious ministry and to the millions of Americans they serve. It is also a matter of great importance to Federal and State grand juries and prosecutors throughout the land to have the limits, if any, on a grand jury's right in such circumstances settled.

New York's Court of Appeals held that the Free Exercise Clause of the First Amendment imposes no limitation on a grand jury's right that is broader than the statutory priest-penitent privilege. The importance of settling the issue raised by that holding is dealt with in greater detail in the attached brief.

In this case of first impression, it might be helpful to this Court to consider the attached brief in deciding whether Petitioner's application for a writ of certiorari should be granted.

WHEREFORE, the Archdiocese prays that this Court grant it leave to file the attached brief *amicus curiae*.

Respectfully submitted,

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August 10, 1979

IN THE

Supreme Court of the United States

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BRIEF OF ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF ROMAN CATHOLIC ARCHDIOCESE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Introductory Statement

The essential facts of record in this case, the provision of the United States Constitution involved, the pertinent New York statutory provision and the opinions of the Court below are set forth in the Petition for a Writ of Certiorari to the New York Court of Appeals. We accept them for the purpose of this brief.

Interest of the *Amicus Curiae*

The Archdiocese of New York is a diocese of the Roman Catholic Church with ecclesiastical jurisdiction in the County of New York and in nine other counties of the State

of New York. It is administered by the Archbishop of New York, His Eminence Terence Cardinal Cooke, who exercises authority over more than 2,000 diocesan and religious priests and more than 6,000 religious sisters and brothers, serving an area with a total population of more than 5,000,000 of whom approximately 1,800,000 are Catholics.

The Petitioner herein is an ordained priest of the Archdiocese. For many years after his ordination he visited prisons in New York City, ministered to prisoners, talked to people in the prison system and became interested in prison reform. He served on the City Council from 1974 through 1977.

In 1977, the Petitioner testified as a witness before a grand jury held in and for the County of New York, which was investigating whether certain crimes had been committed by officials or other employees of the New York City Department of Correction or by private citizens. A series of questions was put to him that centered around visits that the Petitioner had made to a prisoner in 1974 and 1975 and to conversations the Petitioner then had with officials of the City Department of Correction.

The Petitioner was sustained by the presiding Justice (hereinafter referred to as the "Trial Court") in his refusal to answer certain of the questions on the ground that they related to confidential communications with the prisoner that were protected by the statutory priest-penitent privilege. There were five other questions, all concerning his conversations with prison officials after visiting the prisoner. The Petitioner declined to answer them on the ground they were a needless intrusion on his constitutionally protected right to the free exercise of his religious ministry.

The Trial Court found that there was no indication that the Petitioner had significant evidence of criminal activities which was important for the grand jury to have, that

there were doubts whether the testimony of the witness would contribute significantly to the discovery of crime, that the prosecutor already had on tape, and in typewritten transcripts, the information about which the Petitioner was being questioned, and that there were alternative sources of information available to the grand jury. Nevertheless, the Trial Court adjudged the Petitioner guilty of criminal contempt for his refusal to answer those questions and sentenced him to ten days in jail. That judgment was affirmed on July 20, 1978 by a decision of the Appellate Division of the Supreme Court of the State of New York, First Department and on May 8, 1979 by a decision of the New York Court of Appeals.

In its opinion, the New York Court of Appeals held that the Petitioner had raised "no colorable First Amendment right", reasoning that "the statuory privilege . . . affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute . . .".

The important issue of the nature and scope of a clergyman's constitutional right to the free exercise of his ministry, when appearing as a witness before a grand jury, is a matter of deep concern to the clergy, religious and laity of the Archdiocese of New York. For reasons appearing later in this brief, we believe that issue is also a matter of interest to all religious ministers in our country, regardless of the religious faiths that they profess, to all citizens of the United States to whom they minister, and to Federal and State grand juries and prosecutors in all jurisdictions of the nation.

The holding of New York's Court of Appeals in this case that the First Amendment has no application raises a substantial question of first impression that should be settled by this Court.

Question Presented

The Petitioner is not contending that his religious ministry gives him a blanket privilege against testifying at all, or that a clergyman has a general right to resist all questioning until the Government satisfies certain conditions. He does not, moreover, argue for a right that extends beyond information obtained in the course of his religious duties, nor for an absolute right even as to such information, but merely for the application of a balancing test such as this Court has applied in other contexts. Finally, the Petitioner does not contend that a clergyman can ever rely upon his status as a religious minister to shield his own unlawful activities, except to the extent that he might invoke the Fifth Amendment privilege against self-incrimination.

Petitioner's contention before the New York Courts that the unanswered questions for which he was adjudged guilty of contempt intruded upon the statutory priest-penitent privilege was rejected by the New York Court of Appeals and it is, therefore, no longer an issue in this case.

The issue in this case arises by reason of Petitioner's alternative contention in the New York Courts that those questions related to acts performed by him in the exercise of his ministry, that to answer them would intrude upon the free exercise of his religion, and that the application of a balancing test to the particular facts and circumstances of his case would show that the grand jury did not have a compelling need for his testimony. The New York Court of Appeals rejected that contention because it raised "no colorable First Amendment right".

Accordingly, we believe that the only question presented by this case is:

> Does a clergyman, testifying as a witness before a grand jury, who is asked questions about acts performed in carrying out his religious ministry, other than those protected by a statutory priest-penitent privilege, have a right under the Free Exercise Clause of the First Amendment to require the presiding judge to apply a balancing test in deciding whether, under the particular facts and circumstances, the grand jury's need for his testimony is so compelling that it outweighs his First Amendment right?

The record shows that the Trial Court ordered the Petitioner to answer even after having found, as appears in greater detail below, (i) that there was no indication that he had significant evidence of criminal activities which was important for the grand jury to have, (ii) that there were doubts whether the testimony of the witness would contribute significantly to the discovery of crime and (iii) that there were alternative sources of information available to the grand jury.

Argument

We respectfully submit that there are several persuasive reasons for the granting of the Petitioner's application for a writ of certiorari.

I. This case presents an issue of religious freedom that is fundamental

This Court has often said that the right to the free exercise of one's religion is one of the most important rights granted by the United States Constitution. It is difficult to imagine a more fundamental issue of religious freedom than the right of a clergyman, whether he be priest, rabbi or minister, to carry out his religious activities free from unnecessary governmental intrusion.

This case presents a clear instance of unnecessary intrusion. A clergyman is called as a witness before a grand

jury to testify about his visits to a prisoner and his talks with prison officials. He does not decline to appear on the ground that he has a special immunity as a clergyman. He does not invoke a general privilege against testifying. In fact, he willingly testifies about matters that do not involve confidential aspects of the exercise of his ministry. He does, however, decline to respond to questions about communications with the prisoner to whom he was ministering, and, as to them, his claim of statutory privilege is upheld. He refuses also to answer questions about his conversations with prison officials after having visited the prisoner, and asserts that to answer would violate the confidentiality of his relationship with the prisoner, be contrary to a fundamental principle of his ministry, and create a serious impediment to the effective exercise of his ministry in the future. He points out that the prosecutor already has tapes of his conversations, states that he has no knowledge of illegal activities and claims that the grand jury has alternative sources of information.

The grand jury, the prosecutor, and the presiding judge especially, assuming them all to be citizens resolved in conscience to observe the dictates of our Constitution, are thereby confronted with a serious issue of religious freedom. Must the clergyman's right to the free exercise of his ministry be respected to the extent of according him an absolute privilege against testifying about acts performed in the course of his ministry? Or, on the other hand, is the interest of the grand jury in carrying out its important responsibility of investigating crime so absolutely compelling that the First Amendment rights of the clergyman must be overridden without further inquiry? Is there, however, a middle ground? Is the presiding judge, as a sworn guardian of the constitutional rights of all citizens, obliged to look into the facts and circumstances of the particular case and to strike a balance between the constitutionally protected right of the clergyman and the interest of the grand jury in requiring his testimony?

The last of these questions frames the important issue of religious freedom that this case presents. We believe that no clear answer to it has yet been given by this Court.

II. The question raised by this case is of national interest

The answer to the question in this case will have an impact on the religious ministry of tens of thousands of clergymen of all religious faiths and on their spiritual relationships with the millions of Americans to whom they minister. According to the latest available data, based on reports from 223 major religious bodies in the United States, the number of clergymen in this country exceeds 479,000 and they serve a combined church membership that exceeds 131,000,000. *Yearbook of American and Canadian Churches 1978* (National Council of the Churches of Christ in the United States of America), Tables 1-A and 1-B at pp. 217-224.

These are times in which clergymen and other religiously-committed citizens are acting upon their perception that they have a conscientious commitment to involve themselves constructively with the needs and aspirations of their fellow citizens who are culturally, socially and economically disadvantaged. As a result of their contacts with persons engaged, or alleged to be engaged, in criminal activities and with those accused of crimes, the convicted and the imprisoned, clergymen are with increasing frequency being called to testify as witnesses before grand juries, Federal and State, in all jurisdictions of the nation. They, and their brothers and sisters in religion, and the people whose religious needs they are serving, badly need a definitive statement by this Court about the nature and scope of the protection, if any, afforded by the Free Exercise Clause to a clergyman in a case such as this.

III. In this case of first impression, the New York court's restrictive interpretation of the Free Exercise Clause should not be allowed to stand

In rejecting the Petitioner's claim that his First Amendment rights entitled him to judicial protection in the form of a balancing test, the New York Court of Appeals reasoned:

> "On the record before us, appellant raises no colorable First Amendment right. His right to practice his ministry cannot serve to shield him from shedding light upon whether or not any unlawful efforts were undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance into work release programs or to obtain a transfer to less secure institutions. In so holding, we observe that the statutory privilege (CPLR 4505) affords appellant any necessary protection against infringement of freedom of religion by Grand Jury investigations, and we reject his contention that the right to practice his ministry bestows more extensive protection beyond the scope of the priest-penitent privilege accorded by statute. (Cf. *Branzburg* v. *Hayes,* 408 US 665, *supra.*) Absent a showing that the conversations sought to be disclosed are embraced by the priest-penitent privilege, appellant, even though a clergyman, is, like all citizens, obligated to respond to those questions relevant to the Grand Jury's investigation."

We submit that the New York Court's opinion misconstrued the relationship between the Free Exercise Clause and the statutory priest-penitent privilege. The court in effect said that a clergyman's testimonial rights under the First Amendment were one and the same as, and not broader than, the priest-penitent privilege. The Court's

error seems evident from a mere reading of the New York statute:

> "Unless the person confessing or confiding waives the privilege, a clergyman, or other minister of any religion or duly accredited Christian Science practitioner, shall not be allowed to disclose a confession or confidence made to him in his professional character as spiritual advisor." (New York Civil Practice Law and Rules § 4505)

From the language of the statute it is clear that the priest-penitent privilege in New York, as in the statutes of other States, is not a privilege of the clergyman at all; it is solely the privilege of the "person confessing or confiding". That person alone can invoke it and that person alone can waive it.

The New York Court's holding amounts, moreover, to a declaration that in all cases, regardless of the circumstances, the investigatory rights of a grand jury are so sweeping that, except for priest-penitent communications, the acts of a clergyman in the exercise of his ministry are not entitled to constitutional recognition, not even to the extent of being entitled to judicial protection on a case-to-case basis. The result is to give First Amendment weight only to one part of a clergyman's religious ministry and deny it to the rest, thereby drawing a line between what part of a religious ministry is constitutionally recognizable and what part is not. The drawing of that line ignores the fact that in the doctrine of the Roman Catholic Church, mirrored in the doctrines of other denominations, the essence of religious ministry extends far beyond priest-penitent communications. A Catholic priest, for example, has, as part of his sacred ministry an obligation to "instruct the spiritually ignorant, to console the sick, to strengthen the wavering, to pacify the quarrelsome, to counsel the spiritually doubtful, to support the tempted

and discouraged, to assist the dying . . .". (Rev. Robert E. Regan, O.S.A., S.T.L., *The Moral Principles Governing Professional Secrecy with an Inquiry into Some of the More Important Professional Secrets,* Studies in Sacred Theology No. 60 (The Catholic University of America, Washington, D.C. 1941), at page 172. Indeed, this Court has already observed in a case involving the First Amendment rights of an ordained minister that his right to the free exercise of religion "unquestionably encompasses the right to preach, proselytize and perform other similar religious functions . . .". *McDaniel* v. *Paty,* 435 U.S. 618, 626 (1978).

Then, too, the New York court's oversimplification of the issue of free exercise of religion passes over the serious problem of conscience that confronts a clergyman called upon to testify about ministerial acts that are outside the ambit of the priest-penitent privilege. In the doctrine of the Roman Catholic Church, for example, there are what are known as extra-sacramental secrets:

> "The extra-sacramental secret denotes the obligation of secrecy incumbent on the priest with reference to those confidences entrusted to him precisely in view of his sacred priestly character (but entirely apart from the sacrament of Penance) for the purpose of obtaining some service which by reason of his sacred ministry he is prepared to give." (Rev. Robert E. Regan, *op. cit.* at pp. 171-172)

IV. There is a need for this Court to define the extent, if any, to which its decision in *Branzburg* applies to Free Exercise cases

The New York court interpreted this Court's widely cited and discussed holding in *Branzburg* v. *Hayes,* 408 U.S. 665 (1972), as if it had direct application to the testimonial rights of a clergyman when appearing before a

grand jury. In so doing, it rejected arguments pointing out constitutionally significant distinctions between clergymen and newsmen and between the free exercise of religion and the First Amendment guaranty of freedom of the press.

The New York Court of Appeals cited *Branzburg* as the sole authority for the essence of what it decided in this case. Moreover, it affirmed a decision of New York's Appellate Division that had held:

> "Although confronted with a freedom of the press issue, the Court in *Branzburg* explicitly held that the only constitutionally protected testimonial privilege for unofficial witnessses is the Fifth Amendment right against compulsory self-incrimination. (At pp. 689-690.)"

This *amicus curiae* submits that there are such important distinctions between the kind of testimonial rights in this case and the kind in *Branzburg* that this Court would conclude that, as between them, there is a constitutional dichotomy. Two of those important distinctions are these:

> (a) In *Branzburg* the newsmen argued that forced grand jury disclosures would *damage* the ability of the press to gather news and thus *ultimately* affect the constitutionally protected rights of the press to report news. In that vein, this Court's opinion referred to "the consequential, but uncertain burden on news gathering". [page 690] On the other hand, to compel a clergyman to testify about acts performed in the practice of his ministry would not be a mere "uncertain burden" on his activities but a direct invasion of his religious freedom, a point-blank breach of his solemn, religiously-based responsibility of maintaining confidentiality.

(b) The historical, societal, factual and jurisprudential differences between the freedom of press and freedom of religion clauses are constitutionally significant and sufficient, therefore, to warrant a different rule with respect to the testimonial rights of clergymen.

As we read this Court's opinions in *Branzburg,* not a single word was said about the testimonial rights of clergymen, about the priest-penitent privilege, or even about the Free Exercise Clause of the First Amendment. There was, moreover, nothing in those opinions that would necessarily support an analogy between the testimonial rights of newsmen and the testimonial rights of clergymen exercising their ministry. It may be that this Court will on some occasion, perhaps even in this case, choose to draw such an analogy, but we respectfully submit that it has not yet done so and there was no sound basis for the New York court to infer that it had.

This Court has repeatedly said that the free exercise of one's religion is such a precious constitutional liberty that the judiciary is required to give special consideration to the sensitive task of weighing governmental interests when faced with a threatened infringement on that First Amendment right. *Thomas* v. *Collins,* 323 U.S. 516, 530 (1945); *NAACP* v. *Button,* 371 U.S. 415, 438 (1963); *Sherbert* v. *Verner,* 374 U.S. 398, 403, 406, 407 (1963); and *Wisconsin* v. *Yoder,* 406 U.S. 205, 214, 215, 220, 235 (1972).

V. This case could be the occasion for an illustration of the application of a "balancing test"

The New York courts rejected Petitioner's contention that a "balancing test" should be applied before he was directed, under threat of imprisonment, to testify about his ministerial acts. This Court's holding in *Branzburg* was read as dispensing with a constitutional requirement

for such a test, regardless of the circumstances, because of the absolute and unqualified predominance of the testimonial demands of a grand jury.

This *amicus curiae* believes that, to the contrary, there are clear indications in the majority opinion in *Branzburg* that, even as to newsmen, a "balancing test" is constitutionally indicated under certain circumstances, e.g., at pages 686, 690 and 700, of that opinion. In any event, the appropriateness of such a test is clearly stated in the concurring opinion of Mr. Justice Powell at page 710:

> "The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions."

The facts of record in this case virtually cry out for a careful weighing of Petitioner's First Amendment rights against the testimonial needs of the New York grand jury. The record shows that the Trial Court found:

(a) That what the Petitioner did in visiting the prisoner and speaking to officials of the Department of Correction on the prisoner's behalf was suitable to the ministry (21a).*

(b) That the Petitioner was not a target of the criminal investigation (17a).

(c) That there was no indication of any knowledge on the part of the Petitioner of improper activities (18a).

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* Numbers in parentheses refer to pages of the Petitioner's appendix.

(d) That there was no indication that the Petitioner had done anything that was criminal or culpable (19a).

(e) That there was no evidence that the Petitioner was aware of anything illegal occurring (20a).

(f) That there was no indication that the Petitioner had significant evidence of criminal activities which was important for the grand jury to have (21a).

(g) That the prosecutor already had on tape and in written transcripts the information about which the Petitioner was being questioned (16a).

(h) That there were alternative sources of information available to the grand jury (16a).

(i) That the application of a balancing test would show no compelling need for the Petitioner's testimony (20a-21a).

The *amicus curiae* submits that this case presents an ideal example of the need for the application of a "balancing test" when a clergyman's right to the practice of his religious ministry clashes with the demands of a grand jury.

Conclusion

The *amicus curiae* asks, therefore, that this Court grant the petition for a writ of certiorari to the New York Court of Appeals.

Respectfully submitted,

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